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Surviving the Commerce Clause: How Maryland Can Square Its Renewable Energy Laws with the Federal Constitution

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Comments

SURVIVING THE COMMERCE CLAUSE: HOW MARYLAND CAN SQUARE ITS RENEWABLE ENERGY LAWS WITH THE FEDERAL CONSTITUTION

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The renewable energy industry is booming. Worldwide, companies invested $260 billion in clean energy last year.[1] Nearly $56 billion of that investment occurred in the United States.[2] Individual states have also begun to latch onto the promise of renewable energy. Twenty-nine states, including Maryland, have mandatory renewable energy laws, known as Renewable Portfolio Standards ("RPSs").[3]

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1. Press Release, Bloomberg New Energy Finance, Solar Surge Drives Record Clean Energy Investment in 2011 (Jan. 12, 2012), *available at* http://www.bnef.com/PressReleases/view/180.

2. *Id.*

3. The twenty-nine mandatory state RPSs are: (1) Arizona Renewable Energy Standard and Tariff, ARIZ. ADMIN. CODE 14-2-18 (2010); (2) California Renewables Portfolio Standard Program, CAL. PUB. UTIL. CODE § 399.11 (West 2011); (3) Colorado Renewable Energy Standard, COLO. REV. STAT. ANN. § 40-2-124 (West 2004 & Supp. 2011); (4) Connecticut Renewable Energy Portfolio Standards, CONN. GEN. STAT. ANN. § 16-245a (West 2007); (5) Delaware Renewable Portfolio Standards Act, DEL. CODE ANN. tit. 26, §§ 351–64 (West 2009); (6) Hawaii Renewable Portfolio Standards, HAW. REV. STAT. §§ 269-91 *et seq.* (West 2011); (7) Illinois Renewable Portfolio Standard, 20 ILL. COMP. STAT. ANN. 3855 / 1-75(c)(1) (West 2008); (8) Iowa Alternate Energy Production Facilities, IOWA CODE ANN. §§ 476.41–476.48 (West 2009 & Supp. 2011); (9) Kansas Renewable Energy Standards Act, KAN. STAT. ANN. §§ 66-1256 to 66-1262 (West 2009 & Supp. 2011); (10) Maine Renewable Portfolio Requirements, ME. REV. STAT. ANN. tit. 35-A, § 3210(3)-(3-A) (2011); (11) Maryland Renewable Energy Portfolio Standard, MD. CODE. ANN., PUB. UTIL. §§ 7-701 *et seq.* (LexisNexis 2011); (12) Massachusetts Renewable Energy Portfolio Standard for Retail Electricity Suppliers, MASS. GEN. LAWS ANN. ch. 25A, § 11F (West 2010); (13) Michigan Clean, Renewable, and Efficient Energy Act, MICH. COMP. LAWS ANN. §§ 460.1001 *et seq.* (West 2002 & Supp. 2011); (14) Minnesota Renewable Energy Standard, MINN. STAT. ANN. § 216B.1691 (West 2010); (15) Missouri Renewable Energy Standard, MO. ANN. STAT. §§ 393.1025, 393.1030 (West 2011); (16) Montana Renewable Power Production and Rural

These laws require that a portion of a state's energy consumption derive from renewable energy and are a significant driver of the renewable energy boom. A 2010 study, for example, estimated that state RPS policies will spur a 250 percent increase in renewable energy generation by 2025.[4]

At a time when the United States is realizing the consequences of decades of reliance on fossil fuels such as coal and oil, developing renewable energy is particularly critical. The reality of this reliance was highlighted in April 2010 when an explosion at a coal mine in West Virginia killed twenty-nine miners.[5] Fifteen days later,[6] a BP-owned drilling rig in the Gulf of Mexico malfunctioned, triggering the

Economic Development Act, MONT. CODE ANN. §§ 69-3-2001 *et seq.* (2011); (17) Nevada Portfolio Standard, NEV. REV. STAT. ANN. § 704.7821 (West 2009); (18) New Hampshire Electric Renewable Portfolio Standard, N.H. REV. STAT. ANN. § 362-F (LexisNexis 2011); (19) New Jersey Renewable Portfolio Standards, N.J. ADMIN. CODE § 14:8-2.1 (2011); (20) New Mexico Renewable Portfolio Standard, N.M. STAT. ANN. § 62-15-34 (West 2004 & Supp. 2011); (21) New York Renewable Portfolio Standard, N.Y. PUB. SERV. COMM'N ORDER, CASE 03-E-0188, ORDER APPROVING IMPLEMENTATION PLAN, ADOPTING CLARIFICATIONS, AND MODIFYING ENVIRONMENTAL DISCLOSURE PROGRAM (2004); (22) North Carolina Renewable Energy and Energy Efficiency Portfolio Standard, N.C. GEN. STAT. § 62-133.8 (West 2011); (23) Ohio Alternative Energy Portfolio Standard, OHIO ADMIN. CODE 4901:1-40 (2011); (24) Oregon Renewable Portfolio Standards, OR. REV. STAT. ANN. § 496A (West 2011); (25) Pennsylvania Alternative Energy Portfolio Act, 73 PA. CONS. STAT. ANN. § 1648 (West 2008); (26) Rhode Island Long-Term Contracting Standard for Renewable Energy, R.I. GEN. LAWS ANN. § 39-26.1 (West 2006); (27) Texas Goal for Renewable Energy, TEX. UTIL. CODE ANN. § 39.904 (West 2007); (28) Washington Energy Independence Act, WASH. REV. CODE ANN. §§ 19.285.010—.080 (West 2007); (29) Wisconsin Renewable Resources, WIS. STAT. ANN. § 196.378 (West 1992).

The District of Columbia also has a mandatory renewable energy standard. D.C. Renewable Energy Portfolio Standards, D.C. CODE §§ 34-1431 *et seq.* (2011).

Eight states—Indiana, North Dakota, Oklahoma, South Dakota, Utah, Virginia, Vermont, and West Virginia—have nonbinding goals for adoption of renewable energy instead of an RPS. *RPS Policies*, DATABASE OF STATE INCENTIVES FOR RENEWABLES AND EFFICIENCY, http://www.dsireusa.org/summarymaps/index.cfm?ee=1&RE=1 (last updated Aug. 2011).

4. Press Release, IHS, IHS Study: State RPS Policies Will Drive 250% Increase in Renewable Energy Generation by 2025 (June 30, 2010), *available at* http://press.ihs.com/press-release/ehs-sustainability/ihs-study-state-rps-policies-will-drive-250-increase-renewable-ener.

5. *See, e.g.*, Bernie Becker, *West Virginia Coal Towns Mourn the Miners Lost*, N.Y. TIMES, Apr. 10, 2010, *available at* http://www.nytimes.com/2010/04/11/us11mourn.html?ref=miningdisasters.

6. The West Virginia coal mine explosion occurred on April 5, 2010. Ian Urbina, *Toll Mounts in West Virginia Coal Mine Explosion*, N.Y. TIMES, Apr. 5, 2010, *available at* http://www.nytimes.com/2010/04/06/us/06westvirginia.html. The BP drilling rig exploded on April 20, 2010. Jad Mouawad, *For BP, a History of Spills and Safety Lapses* N.Y. TIMES, May 8, 2010, *available at* http://www.nytimes.com/2010/05/09/business/09bp.html.

"greatest environmental disaster of its kind in [American] history."[7] These two catastrophes, within the same month, only added to the growing sense that our nation's energy policy needs reform.[8] While the debate continues over the exact effects of burning coal and oil for energy, no credible scientist doubts that fossil fuels cause air and water pollution, and few dispute the energy sources' contribution to climate change.[9] In addition, traditional energy sources are finite and are often imported from volatile countries.[10]

State RPSs therefore represent a vital policy tool to ease the transition away from traditional energy. The laws, however, are a work in progress. The RPSs are open to challenges under the U.S. Constitution's Commerce Clause because many of them favor renewable energy produced in-state or within a defined region.[11] Lawsuits have already arisen in two states. In Massachusetts, a large energy company filed suit alleging that the state's RPS impeded its ability to compete fairly within Massachusetts.[12] In response, Massachusetts struck a portion of its law[13] and reached a partial settlement with the company.[14]

7. Press Release, The White House, Remarks by the President After Meeting with BP Oil Spill Commission Co-Chairs (June 1, 2010), *available at* http://www.whitehouse.gov/the-press-office/remarks-president-after-meeting-with-bp-oil-spill-commission-co-chairs.

8. *See* Elisabeth Bumiller & Adam Nagourney, *Bush: 'America is Addicted to Oil'*, N.Y. TIMES, Feb. 1, 2006, *available at* http://www.nytimes.com/2006/02/01/world/americas/01iht-state.html (explaining that in his 2006 State of the Union address, President Bush (who was not known to oppose traditional forms of energy) declared that "America is addicted to oil" and set a goal of replacing 75 percent of the nation's Mideast oil imports with alternative energy sources by 2025).

9. See, for example, the most recent report by the U.N. Intergovernmental Panel on Climate Change ("IPCC"), a scientific body considered the leading international organization on climate science, which concludes with "very high confidence" that humans have caused most of the observed increase in global average temperatures since the mid-twentieth century. Richard B. Alley et al., *Summary for Policymakers*, *in* IPCC, CLIMATE CHANGE 2007: THE PHYSICAL SCIENCE BASIS, (Susan Solomon et al. eds., 2007). But see the findings of a MIT meteorology professor, Richard S. Lindzen, who argues that confident predictions of climate catastrophe are unwarranted. Richard S. Lindzen, Op-Ed, *The Climate Science Isn't Settled*, WALL ST. J. (Nov. 30, 2009, 7:44 PM), http://online.wsj.com/article/SB10001424052748703939404574567423917025400.html.

10. *See, e.g.*, Jordan Weissmann, *Will the Iran Sanctions Spark an International Oil Crisis?*, ATLANTIC (Jan. 9, 2012, 3:29 PM), http://www.theatlantic.com/business/archive/2012/01/will-the-iran-sanctions-spark-an-international-oil-crisis/251094/ (explaining how sanctions against oil-rich Iran for its nuclear program threaten to create an international oil crisis).

11. U.S. CONST. art. I, § 8, cl. 3; *see also infra* Part I.A (explaining the Commerce Clause).

12. Complaint, TransCanada Power Mktg. Ltd. v. Bowles, No. 4:10-cv-40070 (D. Mass. Apr. 16, 2010).

13. *See* Order Adopting Emergency Regulations, D.P.U. 10-58 (Mass. Dep't of Pub. Utils. June 9, 2010) (revising 220 MASS. CODE REGS. §§ 17.00 *et seq.*).

Less than a year after this challenge, a conservative advocacy group filed suit in federal court asserting that Colorado's renewable energy laws violated the Commerce Clause.[15] Although that case is still pending,[16] the group is already preparing for new challenges.[17] If it wins in Colorado, the organization plans to target renewable energy laws in other states.[18]

Maryland has had an RPS since 2004 and is among the states vulnerable to potential challenges.[19] Its renewable energy policies will only draw more scrutiny if it becomes one of the first states to pursue offshore wind development.[20] Because Maryland's law favors renewable energy generated within a defined region, a court could find that certain provisions of Maryland's law are unconstitutional.[21] Although courts could overlook the constitutional defects of the RPS by focusing on the benefits of renewable energy, they are more likely to find that Maryland could continue to receive the benefits of renewable energy through less discriminatory means.[22] State renewable energy laws like Maryland's are too vital a policy tool to risk having them overturned by a court. Given the recent challenges to state RPSs, Maryland should consider taking steps today to preempt possible attacks.[23] While overhauling the entire RPS is far from necessary, Maryland can follow Massachusetts's lead and amend the most constitu-

14. Email from Dwayne Breger, Dir., Renewable and Alternative Energy Development, Mass. Dep't of Energy Resources, to stakeholders, TransCanada and Massachusetts Settlement Announcement (May 28, 2010), *available at* http://www.nepoolgis.com/GeneralDoc/Archive.asp (Program Update Archived).

15. Amended Complaint for Injunctive Relief and Declaratory Relief, Am. Tradition Inst. v. Colorado, No. 1:11-cv-00859-WJM-KLM (D. Colo. Apr. 22, 2011).

16. Am. Tradition Inst. v. Colorado, No. 1:11-cv-00859-WJM-KLM, 2011 WL 3705108, at *3 (D. Colo. Aug. 23, 2011) (granting a stay of all proceedings).

17. *ATI Environmental Law Center v. State of Colorado Renewables Mandate—Pt. 3, Possible Outcomes*, AM. TRADITION INST. (Aug. 14, 2011), http://www.atinstitute.org/ati-environmental-law-center-v-state-of-colorado-renewables-mandate-%E2%80%93-pt-3-possible-outcomes/ [hereinafter *Possible Outcomes*] (declaring that the American Tradition Institute is "putting wind on trial").

18. *Id.*

19. *See infra* Part I.B.2.c.

20. Press Release, Office of Governor Martin O'Malley, Governor O'Malley Introduces the Maryland Offshore Wind Energy Act of 2011 (Feb. 11, 2011), *available at* http://www.gov.state.md.us/pressreleases/110211b.asp.

21. *See infra* Part II.A.1 (arguing that provisions of Maryland's RPS are unconstitutional); *see also infra* Part II.A.2 (arguing that the broad RPS system is constitutional).

22. *See infra* Part II.A.1.b.ii.

23. Although the federal government could also take action, this Comment will focus on actions Maryland can take to ensure its renewable energy laws are not struck down as unconstitutional. For a brief discussion of steps the federal government should take, see *infra* note 247.

tionally suspect provisions without significantly affecting the purpose of the law.[24]

I. BACKGROUND

Although constitutional challenges to renewable energy laws are relatively new, the Supreme Court's Commerce Clause jurisprudence dates back to the early nineteenth century.[25] A court would therefore analyze any challenge to Maryland's RPS against the Court's historic understanding of the Commerce Clause.[26] The Court's more recent decisions in cases involving Commerce Clause challenges to energy-related laws are also useful when determining how a court would evaluate Maryland's law.[27] While a detailed description of U.S. energy regulation is not within the scope of this Comment, a basic understanding of RPS legislation is helpful.[28] The structure of and challenges to the renewable energy laws in Massachusetts[29] and Colorado[30] reveal the types of policies that invite constitutional scrutiny. Finally, an overview of Maryland's RPS is necessary to determine the success of any potential challenge.[31]

A. Commerce Clause Overview

The Commerce Clause provides that "Congress shall have Power . . . [t]o regulate Commerce . . . among the several states . . . ."[32] The Supreme Court has found that the clause grants Congress the exclusive authority to regulate interstate commerce.[33] In addition, the Court has long held that the clause prohibits states from unduly burdening interstate commerce, even in the absence of federal regulation.[34] This "negative" aspect of the Commerce Clause is referred to

24. *See infra* Part II.B.

25. *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 76–79 (1824) (interpreting the Commerce Clause).

26. *See infra* Part I.A.

27. *See infra* Part I.A.

28. *See infra* Part I.B.1.

29. *See infra* Part I.B.2.a.

30. *See infra* Part I.B.2.b.

31. *See infra* Part I.B.2.c.

32. U.S. CONST. art. I, § 8, cl. 3. The Constitution also grants Congress the authority to regulate foreign commerce. *Id.*

33. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 180 (1824) ("[T]he power to regulate commerce [i]s exclusively vested in Congress.").

34. *See, e.g.*, New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 273 (1988) ("[T]he Commerce Clause not only grants Congress the authority to regulate commerce among

as the dormant Commerce Clause.[35] The purpose of the dormant Commerce Clause is to prevent states from interfering with the flow of commerce for their own economic benefit.[36] The Supreme Court has repeatedly interpreted the clause as "invalidat[ing] local laws that impose commercial barriers or discriminate against an article of commerce by reason of its origin or destination out of state."[37]

The dormant Commerce Clause applies to laws that discriminate on their face as well as facially neutral laws with discriminatory effects.[38] Determining the type of discrimination is critical because facially discriminatory laws are subject to stricter scrutiny than laws that merely have discriminatory effects.[39]

1. Facially Discriminatory Laws Receive Strict Scrutiny

Facially discriminatory laws differentiate between articles of commerce based solely on their geographic origins.[40] This disparate treatment violates the Commerce Clause, which is meant to ensure that a product's presence in the market is attributable solely to market forces.[41] Facially discriminatory laws can take a number of forms,

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the States, but also directly limits the power of the States to discriminate against interstate commerce.").

35. *See, e.g.*, C & A Carbone, Inc. v. Clarkstown, 511 U.S. 383, 402 (1994) (O'Connor, J., concurring) (referring to the negative aspect of the clause as the "dormant" Commerce Clause). In addition to the dormant *Interstate* Commerce Clause, which governs commerce between states, the Court has also read a negative aspect into the *Foreign* Commerce Clause, which governs commerce between states and foreign countries. *See* Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 445–46 (1979) (distinguishing the dormant Foreign Commerce Clause from the dormant Interstate Commerce Clause). For ease of reference, this Comment will refer to the dormant Interstate Commerce Clause simply as the dormant Commerce Clause.

36. *See, e.g.*, *Limbach*, 486 U.S. at 273–74 (noting that the dormant Commerce Clause prohibits "regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors").

37. *C & A Carbone*, 511 U.S. at 390.

38. *See infra* Part I.A. Courts also recognize two exceptions to the dormant Commerce Clause: the "market participant" exception and instances where Congress has explicitly authorized the discrimination. *See* White v. Mass. Council of Constr. Emp'rs, Inc., 460 U.S. 204, 208 (1983) ("[W]hen a state or local government enters the market as a participant it is not subject to the restraints of the Commerce Clause."); *see also* Lewis v. BT Inv. Managers, Inc., 447 U.S. 27, 44 (1980) (explaining that Congress can "confer[] upon the States an ability to restrict the flow of interstate commerce that they would not otherwise enjoy"). A detailed description of these exceptions is not necessary for purposes of this Comment.

39. *See infra* Part I.A.

40. *See, e.g.*, Philadelphia v. New Jersey, 437 U.S. 617, 629 (1978) (striking down a New Jersey law that blocked the import of waste from other states).

41. *See, e.g.*, *id.* at 626–27 ("[W]hatever New Jersey's ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently.").

but generally fall into three categories: (1) laws that set up interstate barriers to commerce; (2) laws that manipulate the price of out-of-state versus in-state goods; and (3) laws that attempt to regulate out-of-state conduct.

State laws that create barriers to commerce by blocking imports or exports of goods across state lines violate the Commerce Clause.[42] Not only are laws that hinder commerce from one state to another considered unconstitutional, but the Supreme Court has also held that statutes that set up regional barriers and discriminate against some states rather than all states violate the Commerce Clause.[43] Courts have recently struck down energy-related laws that create barriers to interstate commerce. For example, the Court overturned a New Hampshire law prohibiting hydroelectric plants from selling power out of state before offering it for sale within the state.[44]

In addition to laws that set up interstate barriers to commerce, state laws that manipulate the price of goods because of their origins are also invalid. These laws generally take the form of added taxes and charges on out-of-state goods.[45] For example, the Court struck down an Ohio law that offered a tax credit to fuel dealers who sold ethanol that was either produced in Ohio or in a state that granted reciprocal tax advantages.[46]

42. *See, e.g.*, *id.* at 628 ("The New Jersey law . . . falls squarely within the area that the Commerce Clause puts off limits to state regulation. On its face, it imposes on out-of-state commercial interests the full burden of conserving the State's remaining landfill space."). In *South-Central Timber Development, Inc. v. Wunnicke*, the Court struck down an Alaska regulation requiring that all Alaska timber be processed within the state before export. 467 U.S. 82, 100 (1984). Faced with a similar issue a decade later, the Court struck down a town ordinance requiring non-recyclable solid waste to be processed at designated facility within the municipality before shipping. C & A Carbone, Inc. v. Clarkstown, 511 U.S. 383, 394–95 (1994).

43. Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 335, 353 (1977) (striking down a law that banned the sale of apples in North Carolina from any states with a grading system other than USDA even though the law precluded sales from some but not all states).

44. New England Power Co. v. New Hampshire, 455 U.S. 331, 335, 344 (1982) (holding that a law restricting exports of hydropower hoards resources for a state's economic advantage). The Court also struck down an Oklahoma law requiring in-state plants to burn a mixture of coal containing at least 10 percent Oklahoma-mined coal. Wyoming v. Oklahoma, 502 U.S. 437, 443, 455 (1992). In Illinois, a court declared unconstitutional a law that encouraged the use of in-state coal by ensuring that coal plants burning sulfur-heavy coal would meet Clean Air Act requirements. Alliance for Clean Coal v. Miller, 44 F.3d 591, 593, 595 (7th Cir. 1995).

45. *See, e.g.*, Chem. Waste Mgmt. Inc. v. Hunt, 504 U.S. 334, 336–37 (1992) (invalidating an Alabama law imposing an extra fee on imported hazardous waste).

46. New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 271–80 (1988).

Finally, laws that attempt to regulate the conduct of out-of-state businesses also violate the dormant Commerce Clause.[47] Many of these laws tie the price of goods to the price charged in other states, which may have the practical effect of regulating what interstate sellers can charge in those other states.[48] Other impermissible laws regulate the in-state market for a product that is manufactured solely outside the state.[49] Courts take the cumulative effect of these laws into account, reasoning that if one state is allowed to enact a law regulating out-of-state business, other states could impose similar laws, which would have a stifling overall effect on interstate commerce and the economy.[50]

State laws that discriminate against interstate commerce on their face trigger strict scrutiny and are considered virtually *per se* invalid.[51] Courts review facially discriminatory laws under a two-part strict scrutiny standard, asking (1) whether the law advances a legitimate local purpose; and, if so, (2) whether that purpose can be adequately served by reasonable nondiscriminatory alternatives.[52] The Supreme Court has acknowledged that protecting the environment and public

47. *See, e.g.*, Healy v. Beer Inst., 491 U.S. 324, 326–27, 343 (1989) (striking down a law requiring certification that the price of beer was not higher than that charged out-of-state).

48. *See id.* at 338 (finding that a Connecticut law, which required beer sellers to affirm that their Connecticut prices were no higher than the lowest price charged in a bordering state, had "the extraterritorial effect . . . of preventing brewers from undertaking competitive pricing in" one of the bordering states).

49. *See* Rocky Mountain Farmers Union v. Goldstene, No. CV-F-09-2234 LJO DLB, 2011 WL 6934797, at *2–3, 13 (E.D. Cal. Dec. 29, 2011) (concluding that California's Low Carbon Fuel Standard impermissibly controlled conduct outside of California's borders because the law, which favored certain types of ethanol over others, in effect regulated the manufacture of ethanol—a process that occurs almost entirely outside of California).

50. *See, e.g.*, *Healy*, 491 U.S. at 336 ("[T]he practical effect of the statute must be evaluated . . . by considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation.").

51. *See, e.g.*, Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978) ("[W]here simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected."). *But see* Maine v. Taylor, 477 U.S. 131, 148 (1986) (upholding a facially discriminatory law because Maine's interest in banning out-of-state baitfish was considered legitimate).

52. *See* Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of Or., 511 U.S. 93, 101 (1994) ("[T]he [law] must be invalidated unless . . . it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives."); Hughes v. Oklahoma, 441 U.S. 322, 337 (1979) ("[F]acial discrimination invokes the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives."). This test is a somewhat modified version of the traditional strict scrutiny standard, which requires laws to be "narrowly tailored . . . to further compelling governmental interests." *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995).

health are legitimate goals.[53] In contrast, it does not consider a law aimed at helping struggling local industries to be legitimate, as such a law advances a purely economic end.[54] The lack-of-alternatives exception is also extremely narrow. Only one facially discriminatory law has ever successfully invoked the exception.[55]

2. *Facially Neutral Laws with Discriminatory Effects Trigger a Balancing Test*

When a statute does not discriminate on its face, but instead imposes only incidental burdens on interstate commerce, courts use a balancing approach to determine whether the burdens outweigh the benefits of the law. The analysis, announced by the Court in *Pike v. Bruce Church, Inc.*, weighs the burden imposed on interstate commerce against the statute's local benefits.[56]

Since *Pike*, courts have found that some local benefits, such as improving environmental health and safety, justify a burden on commerce. In *Minnesota v. Clover Leaf Creamery Co.*, for example, the Supreme Court upheld a Minnesota statute banning the use of environmentally harmful plastic milk containers by both in-state and out-of-state sellers.[57] The Court reasoned that "[a] nondiscriminatory regulation serving substantial state purposes is not invalid simply because it causes some business to shift from a predominantly out-of-state industry to a predominantly in-state industry. Only if the burden on interstate commerce clearly outweighs the State's legitimate purposes does such a regulation violate the Commerce Clause."[58] Likewise, in *United Haulers Association, Inc. v. Oneida-Herkimer Solid Waste*

53. *See, e.g.*, Dean Milk Co. v. Madison, 340 U.S. 349, 354 (1951) (acknowledging that a state has an "unquestioned power to protect the health and safety of its people").

54. Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 272 (1984) ("[W]e perceive no principle of Commerce Clause jurisprudence supporting a distinction between thriving and struggling enterprises . . . . [Regardless,] the legislation constitutes 'economic protectionism' in every sense of the phrase."); *see also* United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 346 (2007) ("[R]evenue generation is not a local interest that can justify discrimination against interstate commerce . . . ." (citation and internal quotation marks omitted)).

55. *Taylor*, 477 U.S. at 151–52 (upholding Maine's statute banning the importation of out-of-state baitfish into Maine waters because no alternatives existed to protect domestic population from disease).

56. 397 U.S. 137, 142 (1970) ("Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.").

57. Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 472–74 (1981).

58. *Id.* at 474.

Management Authority, the Court examined a flow-control ordinance that required trash haulers to deliver solid waste to a particular waste processing facility.[59] The Court applied the *Pike* balancing test, concluding that the benefits of the ordinance—creating an effective way to finance waste disposal services and increasing recycling—outweighed the incidental burdens on interstate commerce.[60]

In some cases, however, facially neutral statutes are so clearly a ruse for protectionist behavior that courts have invalidated the laws without even reaching the *Pike* balancing test.[61] Although courts do not dispute that states have the right to protect public health and the environment, when states pass a discriminatory law under the guise of protecting their citizens, courts carefully scrutinize the law's declared purpose. In *New Energy Co. of Indiana v. Limbach*, for example, the Supreme Court considered a law that gave favorable tax treatment to ethanol produced in-state and, its proponents claimed, also protected the state's environment.[62] The Court acknowledged that protecting health is a legitimate state goal but easily concluded that health was "merely an occasional and accidental effect of achieving [the law's main] purpose," which was to benefit in-state ethanol producers.[63]

By contrast, some state laws that appear at first blush to have discriminatory effects on interstate commerce do not discriminate at all. The Maryland case *Exxon Corp. v. Governor of Maryland*[64] provides an example. There, a Maryland statute barred petroleum refiners from operating any retail service station within the State.[65] Since Maryland had no petroleum refiners, the burden of the law fell entirely on interstate companies.[66] Despite the seemingly discriminatory impact of the law, the Court found no Commerce Clause violation, explaining that "[t]he fact that the burden of a state regulation falls on some in-

59. 550 U.S. 330, 334 (2007).

60. *Id.* at 346. Although the Court emphasized that "revenue generation is not a local interest that can justify *discrimination* against interstate commerce," it considered revenue generation "a cognizable benefit for purposes of the *Pike* test." *Id.* (citation and internal quotation marks omitted).

61. *See, e.g.*, Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of Or., 511 U.S. 93, 107–08 (1994) (explaining that characterizing the surcharge on in-state disposal of out-of-state waste as "resource protectionism" did not validate the discriminatory statute).

62. 486 U.S. 269, 271, 279 (1988).

63. *Id.* at 279.

64. 437 U.S. 117 (1978).

65. *Id.* at 119. The statute also required any producer or refiner of petroleum products to "extend all 'voluntary allowances' uniformly to all service stations it supplies." *Id.* at 119–20.

66. *Id.* at 125.

terstate companies does not, by itself, establish a claim of discrimination against interstate commerce."[67]

B. Overview of State Renewable Energy Laws and Challenges

All twenty-nine states with RPSs—including Massachusetts, Colorado, and Maryland—have shaped their laws in accordance with one of two basic structures of RPS legislation.[68] After settling on the broad outline of an RPS, states often incorporate additional mechanisms and incentives that can affect how the law stands up to constitutional scrutiny. Thus, the structures of specific state RPSs provide vital insight into how a court would analyze the Maryland RPS. The Massachusetts RPS provides the first example explored in this section.[69] Since Massachusetts presents the only case in which a challenge to a state RPS has been resolved, the outcome of that challenge is described in detail.[70] The structure of the Colorado RPS and the challenge to that law provide the second example in this section.[71] Finally, this section concludes by outlining the structure of the Maryland RPS.[72]

1. The Basics of Renewable Portfolio Standards

An RPS is a state policy that obligates each retail seller of electricity to offer "a certain amount of electricity from renewable energy resources, such as wind, solar, geothermal, hydro, and various forms of biomass and ocean energy."[73] When shaping the RPS obligation, states have two options: (1) require electricity suppliers to maintain energy derived from renewable sources in their own energy portfolio; or (2) allow suppliers to meet their renewable energy obligations by purchasing tradable renewable energy credits ("RECs").[74] Under the first structure, a facility must physically interconnect with the state or regional electricity system to satisfy the RPS requirement.[75] These sys-

67. *Id.* at 126.

68. *See infra* Part I.B.1 (describing the basics of RPS legislation).

69. *See infra* Part I.B.2.a.

70. *See infra* Part I.B.2.a.

71. *See infra* Part I.B.2.b.

72. *See infra* Part I.B.2.c.

73. NANCY RADER & SCOTT HEMPLING, THE RENEWABLES PORTFOLIO STANDARD: A PRACTICAL GUIDE 1 (2001).

74. *Id.* at 2. "The word 'portfolio' refers to the mix of power supply resources that a retail seller assembles to serve its customers." *Id.*

75. Patrick Jacobi, *Renewable Portfolio Standard Generator Applicability Requirements: How States Can Stop Worrying and Learn to Love the Dormant Commerce Clause*, 30 VT. L. REV. 1079, 1090 (2006).

tems are referred to as "bundled" because the attributes of renewable energy are bundled with electricity and sold together.[76] Under the second framework, retailers can "trade" their obligation; instead of maintaining renewable energy in their own energy portfolios, they need only demonstrate that someone else has generated the required amount of renewable energy.[77] In these cases, renewable energy attributes are "unbundled" from electricity and traded as RECs.[78]

Renewable Portfolio Standards that require bundled energy and attributes are based on contracts between a supplier and a consumer of electricity.[79] Two types of contracts exist: "the 'power pool' arrangement and the bilateral contract."[80] In the power pool arrangement, various electricity providers enter into short-term contracts to contribute electrons to one central pool.[81] A regional transmission organization ("RTO") or an independent system operator ("ISO") coordinates power transmission decisions within the pool to ensure that the supply of electricity meets demand.[82] Power pools can be quite large; the RTO that operates the Mid-Atlantic power pool, for example, supplies power to all or parts of thirteen states and

76. *See* EDWARD A. HOLT & RYAN H. WISER, THE TREATMENT OF RENEWABLE ENERGY CERTIFICATES, EMISSIONS ALLOWANCES, AND GREEN POWER PROGRAMS IN STATE RENEWABLES PORTFOLIO STANDARDS 3 (2007) (mentioning electricity and its "bundled attributes" and explaining that attributes can be unbundled from the underlying electricity and traded separately).

77. *See id.* ("A second approach is to unbundle the attributes from the underlying electricity and allow them to be traded as RECs. Verification of compliance can then take place by examining the number of RECs owned and retired by the obligated entities.").

78. *Id.*

79. *See id.* (mentioning a "chain of custody" in contracts for electricity and their bundled attributes, where "the generating units and their attributes are specified").

80. Jacobi, *supra* note 75, at 1093.

81. *See* STEVEN FERREY, LAW OF INDEPENDENT POWER: DEVELOPMENT, COGENERATION, UTILITY REGULATION § 10:3.1 (West 2005) (1989) ("Generators bid for the right to supply bulk electricity at wholesale through a process specifying price and quantity. The offers are aggregated and a system-wide price is established. All offers to supply power below this price are then accepted by the pool.").

82. RTOs or ISOs operate a regional power pool. *See* JOHN CHANDLEY, HOW RTOS SET SPOT MARKET PRICES (AND HOW THIS HELPS TO KEEP THE LIGHTS ON) 1 n.2, 15 (2007), *available at* http://www.pjm.com/~/media/documents/reports/spot-market-prices-j-chandley.ashx (using RTOs and ISOs interchangeably). The difference between an RTO and an ISO is that the Federal Energy Regulatory Commission does not regulate the size of the region the ISO serves. *PJM's Role in the Energy Industry: FAQs*, PJM.COM, http://pjm.com/Home/about-pjm/learning-center/pjm-overview/pjms-role-in-energy-industry.aspx?faq={035A1DB7-4C51-4E9F-8E59-2007D89FE794} (last visited Jan. 11, 2012). For additional background on RTOs and ISOs, see generally FRED BOSSELMAN ET AL., ENERGY, ECONOMICS, AND THE ENVIRONMENT: CASES AND MATERIALS 860–77 (2006).

the District of Columbia.[83] Under the power pool arrangement, it is difficult to trace the path the electricity will take.[84] In contrast, a bilateral contract is a direct contract between a power producer and a user or broker outside of the centralized power pool and leaves no question of where an electron will arrive.[85]

The alternative to bundled energy and attributes is a REC-based system. This type of RPS involves a trading scheme where utilities can purchase renewable electricity without the costs associated with "production, interconnection, and transmission."[86] Under this scheme, "instead of having to generate or buy renewable energy, retail [electricity] sellers . . . purchase RECs from renewable energy producers and submit them once each year to the [state] program administrator in amounts equal to the required percentage of the total electricity sales."[87]

2. *Specific State RPS Legislation and Related Litigation*

a. *Massachusetts*

In 1997, Massachusetts enacted an RPS and chose to use a REC-based system.[88] Under the Massachusetts RPS, 15 percent of the energy supplied to Massachusetts customers must come from renewable sources by 2020.[89] An electricity supplier may meet this obligation in part through purchasing RECs from qualified suppliers.[90]

In 2008, the Massachusetts legislature significantly revisited its RPS by enacting the Green Communities Act.[91] Section 83 of the Green Communities Act required electric distribution companies to enter into long-term contracts with generators of renewable energy

83. *About PJM: Who We Are*, PJM.COM, http://pjm.com/about-pjm/who-we-are.aspx (last updated Jan. 3, 2012).

84. *See* RADER & HEMPLING, *supra* note 73, at 34 ("While the customer can *contract to pay for* electricity from a specific generator, that generator's output will flow into the grid and commingle with the output of all other generators in the grid.").

85. FERREY, *supra* note 81, at 1, app. B.

86. *See* Jacobi, *supra* note 75, at 1091 (explaining the benefits of a REC-based system).

87. *Id.* (alterations in original) (internal quotation marks omitted).

88. 1997 Mass. Acts 874.

89. 225 MASS. CODE REGS. 14.07 (2007).

90. *See id.* (allowing utilities to meet the RPS through "New Renewable Generation Attributes"); *id.* 14.02 (defining "New Renewable Generation Attributes" as "[t]he Generation Attribute of the electrical energy output of a specific Generation Unit that derives from the Unit's production of New Renewable Generation"). For a description of RECs, see *supra* Part I.B.1.

91. 2008 Mass. Acts 308.

located in Massachusetts.[92] As if anticipating a challenge, Section 83 further provided:

> If any provision of this section is subject to a judicial challenge, the department of public utilities may suspend the applicability of the challenged provision during the pendency of the judicial action until final resolution of the challenge and any appeals, and shall issue such orders and take such other actions as are necessary to ensure that the provisions that are not challenged are implemented expeditiously to achieve the public purposes of this provision.[93]

Section 32 of the Green Communities Act added a provision to the RPS requiring electricity suppliers to purchase RECs from generation units located in Massachusetts.[94] Acting pursuant to this authority, the Massachusetts Division of Energy Resources, added a solar "carve-out" requiring each electricity supplier to meet a portion of its renewable energy quota from solar generators in Massachusetts.[95]

TransCanada, a significant developer and producer of renewable energy in the United States and Canada,[96] challenged both portions of the Green Communities Act as discriminatory on their face. The company argued that Section 83 prevented it "from bidding to fulfill the required long-term contracts by offering renewable energy generated outside Massachusetts, including renewable energy from the Kibby Wind Power Project [in Maine]."[97] The company claimed that the requirements "harm[ed] the public of Massachusetts by increasing prices for renewable energy by prohibiting" TransCanada and other out-of-state generators from competing for the long-term contracts in Massachusetts.[98] In response to TransCanada's lawsuit, and

92. *See id.* at 365 ("[E]ach distribution company . . . shall be required . . . to . . . enter into cost-effective long-term contracts to facilitate the financing of renewable energy generation *within the jurisdictional boundaries of the commonwealth* . . . ." (emphasis added)).

93. *Id.*

94. MASS GEN. LAWS ANN. ch. 25A, § 11F(g) (West 2010). The RPS stated that:

> In satisfying its annual obligations under [the RPS program], each retail supplier shall provide a portion of the required minimum percentage of kilowatt-hours sales from new on-site renewable energy generating sources located in the commonwealth . . . . [T]he department may specify that a certain percentage of these requirements shall be met through energy generated from a specific technology or fuel type.

Id.

95. 225 MASS. CODE REGS. 14.05(4)(a) (2011).

96. Complaint at ¶ 16, TransCanada Power Mktg. Ltd. v. Bowles, No. 4:10-cv-40070 (D. Mass. Apr. 16, 2010).

97. *Id.* ¶ 25.

98. *Id.* ¶ 26.

pursuant to its authority under Section 83, the Massachusetts Department of Public Utilities eliminated the requirement limiting the availability of long-term contracts to in-state renewable resources.[99]

TransCanada also challenged the solar carve-out created under Section 32. The company argued that "[w]ere it not for the discrimination in favor of Massachusetts generation units, Solar RECs would develop in a broader geographic area . . . and they would reach reasonable price points more quickly."[100] Addressing Massachusetts's argument that the solar requirement was meant to further a legitimate environmental purpose, the company explained:

> As in the existing REC program, the environmental benefits of the Solar RECs will be experienced in every location that is affected by traditional power plants generating power for the power grid operated by ISO New England. These may include power plants located in other control areas. There is no reason that the solar generators must be located in Massachusetts in order to create and to verify "the positive environmental attributes associated with this clean energy production."[101]

In May 2010, Massachusetts and TransCanada agreed to settle this portion of the lawsuit.[102] Energy suppliers that had contracts with Massachusetts on or prior to January 1, 2010, including TransCanada, can now meet their portion of the solar renewable energy obligation with out-of-state solar energy sources.[103]

b. Colorado

In 2004, Colorado became the first state in the nation to enact an RPS by ballot measure.[104] Like Massachusetts, the state allows energy suppliers to use tradable RECs to meet their renewable energy obliga-

99. Order Adopting Emergency Regulations, D.P.U. 10-58 (Mass. Dep't of Pub. Utils. June 9, 2010), revising 220 MASS. CODE REGS. §§ 17.00 *et seq.*

100. Complaint at ¶ 42, TransCanada Power Mktg. Ltd. v. Bowles, No. 4:10-cv-40070 (D. Mass. Apr. 16, 2010).

101. *Id.* ¶ 37.

102. Email from Dwayne Breger, Dir., Renewable and Alternative Energy Development, Mass. Dep't of Energy Resources, to stakeholders, TransCanada and Massachusetts Settlement Announcement (May 28, 2010), *available at* http://www.nepoolgis.comgeneral Doc/Archive.asp/ (Program Updates).

103. *Id.*

104. Jesse Broehl, *Colorado Voters Pass Renewable Energy Standard*, RENEWABLEENERGYACCESS.COM (Nov. 3, 2004), http://www.renewableenergyworld.com/rea/news/article/2004/11/colorado-voters-pass-renewable-energy-standard-17736.

tions.[105] In 2010, Colorado revised its RPS by increasing the amount of renewable energy that utilities were required to procure from 20 to 30 percent by 2020.[106] The 30-percent-by-2020 mandate applies to all providers of retail electric service in Colorado except for municipally owned utilities that serve 40,000 customers or fewer and unregulated electric associations.[107]

The law allows for a regional system of tradable RECs, as long as the trading utility uses the same definition of renewable energy as Colorado.[108] To meet its renewable-energy requirement, Colorado favors certain types of energy sources by inflating their compliance value. For example, the RPS counts every kilowatt-hour of renewable energy produced within the state as 1.25 kilowatt-hours of eligible energy.[109] To further promote solar energy, the RPS requires utilities other than cooperative electric associations and municipally owned utilities to offer a rebate to customers who install solar electric generation on their premises.[110] Finally, to stimulate rural economic development, the law doubles the regulatory compliance value of renewable sources if they interconnect to electric transmission or distribution facilities owned by a cooperative electric association or municipally owned utility.[111]

105. COLO. REV. STAT. ANN. § 40-2-124(d) (West 2004 & Supp. 2011). The Colorado RPS requires unbundled RECs. HOLT & WISER, *supra* note 76, at 5 table 1. For a description of RECs, see *supra* Part I.B.1.

106. *Id.* § 40-2-124(1)(c)(I)(E).

107. *Id.* § 40-2-124(1). These excluded providers must generate 10 percent of their energy from renewable sources by 2020. *Id.* § 40-2-124(1)(c)(V).

108. *See id.* § 40-2-124(1)(d) ("The commission shall not restrict the qualifying retail utility's ownership of renewable energy credits if the qualifying retail utility . . . uses definitions of eligible energy resources that are limited to those identified in paragraph (a) [defining renewable energy] of this subsection . . . .").

109. 4 COLO. CODE REGS. § 723-3:3654(e) (2010) ("For purposes of compliance with the renewable energy standard, each kilowatt-hour of eligible energy generated in Colorado, other than retail renewable distributed generation, shall be counted as 1.25 kilowatt-hours of eligible energy."). The RPS also favors "community-based projects," defined as "project[s] located in Colorado," and counts each kilowatt-hour of electricity from renewable resources at these community-based projects as 1.5 kilowatt-hours. COLO. REV. STAT. ANN. § 40-2-124(1)(c)(VI) (West 2004 & Supp. 2011). Municipally owned and cooperative electric associations may count one kilowatt-hour of solar energy as three kilowatt-hours. *Id.* § 40-2-124(1)(c)(VII)(A).

110. COLO. REV. STAT. ANN. § 40-2-124(1)(e) (West 2004 & Supp. 2011).

111. *Id.* § 40-2-124(1)(c)(IX) ("[E]ach kilowatt hour of electricity generated from renewable energy resources that interconnects to electric transmission or distribution facilities owned by a cooperative electric association or municipally owned utility may be counted . . . as two kilowatt hours . . . .").

Under the RPS, renewable distributed generation ("DG") must comprise 3 percent of retail electricity sales by 2020.[112] Distributed generation is comprised of either retail DG or wholesale DG.[113] The statute defines retail DG as "a renewable energy resource that is located on the site of a customer's facilities and is interconnected on the customer's side of the utility meter."[114] Wholesale DG is defined as "a renewable energy resource *in Colorado* with a nameplate rating of thirty megawatts or less and that does not qualify as retail distributed generation."[115] At least one-half of a utility's DG requirements must be met by retail DG.[116]

Finally, the law relieves Colorado utilities from complying with the competitive bidding requirements of the Colorado Public Utility Commission.[117] To protect consumers from rising energy prices, the RPS contains a "retail rate impact rule," effectively limiting the amount of eligible energy resources and renewable energy credits a utility may acquire.[118]

In April 2011, the American Tradition Institute ("ATI"), a conservative Washington-based non-profit dedicated to advancing free-market solutions, challenged Colorado's RPS as violating the dormant Commerce Clause. In its complaint, ATI not only challenged the facially discriminatory portions of Colorado's law, as TransCanada did in Massachusetts, but also argued that Colorado's entire RPS is unconstitutional because it "discriminates on its face against legal, safer, less costly, less polluting and more reliable in-state and out-of-state generators of electricity sold in interstate commerce."[119] The advocacy group advanced three main arguments. First, ATI described its

112. *Id.* § 40-2-124(1)(c)(I)(E).

113. *Id.* § 40-2-124(1)(a)(II).

114. *Id.* § 40-2-124(1)(a)(V).

115. *Id.* § 40-2-124(1)(a)(VI) (emphasis added).

116. *Id.* § 40-2-124(1)(c)(II)(A).

117. *Id.* § 40-2-124(1)(f)(I). The Colorado Public Utilities Commission oversees the Renewable Energy Standard. *See id.* § 40-2-101 (establishing the Public Utilities Commission).

118. *See id.* § 40-2-124(1)(g)(I)(A)–(B) ("[T]he commission shall establish a maximum retail rate impact of this section of two percent of the total electric bill annually for each customer. The retail rate impact shall be determined net of new alternative sources of electricity supply from noneligible energy sources that are reasonably available at the time of the determination. . . . If the retail rate impact does not exceed the maximum impact permitted . . . the qualifying utility may acquire more than the minimum amount of eligible energy resources and renewable energy credits . . . .").

119. Amended Complaint for Declaratory Relief at ¶ 2, Am. Tradition Inst. v. Colorado, No. 1:11-cv-00859-WJM-KLM (D. Colo. Apr. 22, 2011). The complaint was also brought by the American Tradition Partnership and individual plaintiff Rod Lueck. *Id.* For ease of reference, this Comment will only refer to plaintiff American Tradition Institute.

constitutional claim, laying out the seven ways in which the RPS allegedly discriminates against out-of-state-energy sources.[120] Second, ATI questioned the benefits of renewable energy, arguing that renewable energy is unreliable,[121] costly,[122] and actually results in more pollution since coal and natural gas plants must be powered up and down frequently to supplement the intermittent power from wind energy.[123] Third, ATI argued that the purposes of the Colorado RPS[124] could be more effectively achieved by promoting coal and natural gas.[125]

While ATI's complaint contained seven challenges to the constitutionality of the state RPS, only three of the arguments are applicable to Maryland. The first such argument is ATI's broad claim that any renewable energy requirement burdens interstate commerce because it "bars a power source connected to the interstate grid from producing non-renewable power equivalent to the percentage of renewable energy required to meet the Colorado law."[126] The second argument is ATI's claim that the purpose of the RPS is facially discriminatory to electricity generators operating outside of Colorado.[127] The third argument is ATI's claim that Colorado's RPS impermissibly regulates out-of-state conduct by authorizing the use of tradable renewable energy credits but mandating that definitions of "renewable energy" be identical to those set out in the Colorado law.[128]

120. *Id.* at Part II.A–G.

121. *Id.* at Part III.B.

122. *Id.* at Parts III.D, H.

123. *Id.* ¶ 90.

124. Colorado's RPS was established in 2004 through a ballot initiative. The ballot initiative contained a declaration of legislative intent, which stated:

> [I]n order to save consumers and businesses money, attract new businesses and jobs, promote development of rural economies, minimize water use for electricity generation, diversify Colorado's energy resources, reduce the impact of volatile fuel prices, and improve the natural environment of the state, it is in the best interests of the citizens of Colorado to develop and utilize renewable energy resources to the maximum practicable extent.

Colo. Amendment 37, § 1 (2004).

125. Amended Complaint for Declaratory Relief at Part III.I, Am. Tradition Inst. v. Colorado, No. 1:11-cv-00859-WJM-KLM (D. Colo. Apr. 22, 2011).

126. *Id.* ¶ 60.

127. *Id.* at Part II.B (see *supra* note 124 for the purpose of the Colorado law).

128. *Id.* ¶ 75. In addition, ATI's complaint contains six specific challenges that are less relevant for purposes of this Comment. First, it challenges the in-state wholesale DG requirement and the various multipliers favoring in-state renewable energy generation. *Id.* at Part II.C. Second, the organization claims that the regulation's preference for solar energy "establish[es] a market-bias against otherwise non-renewable sources located outside of Colorado." *Id.* ¶ 73. Third, ATI challenges the provision inflating the compliance value of renewable sources that interconnect to electric facilities owned by cooperative

The merit of these arguments is not known at this time because ATI's suit is still pending.[129]

c. Maryland

Maryland enacted its RPS in 2004 and revisited it in 2007, 2008, and 2010.[130] Under Maryland's RPS, electricity suppliers must procure 20 percent of their electricity from renewable sources by 2022.[131] Electricity suppliers comply with the RPS requirements by acquiring RECs, which each represent one megawatt-hour ("MWh") of defined renewable energy sources.[132] The Maryland RPS includes an interconnection requirement: RPS-eligible facilities must be located within the geographic footprint of the PJM interconnection[133] or in an adjacent control area if electricity is delivered into the PJM region.[134]

Maryland also imposes a solar-specific procurement target, commonly known as a solar carve-out: by 2022, 2 percent of RECs used to satisfy the Maryland RPS must come from solar energy.[135] Starting in 2012, solar energy must be generated within Maryland's electricity grid to satisfy Maryland's RPS requirements.[136] Maryland also insti-

electric associations or municipally owned utilities. *Id.* ¶ 74. Fourth, ATI challenges the requirement that Colorado utilities must offer rebates to customers who install solar generating technologies on their premises. *Id.* ¶ 76. Fifth, ATI claims that because municipal and cooperative electric associations are not relieved from the competitive bidding requirements of the Colorado Public Utility Commission rules, their ability to compete effectively in the interstate electricity market is diminished. *Id.* ¶ 77. Sixth, the organization argues that the provision limiting the amount of eligible energy resources and renewable energy credits a qualifying utility may acquire is unconstitutional because it imposes on out-of-state companies a direct limitation on the sales of both renewable resources and renewable energy credits to certain Colorado utilities. *Id.* ¶ 78.

129. Am, Tradition Inst. v. Colorado, No. 1:11-cv-00859-WJM-KLM, 2001 WL 3705108, at *3 (D. Colo. Aug. 23, 2011) (granting a stay of all proceedings).

130. *Maryland: Renewable Energy Portfolio Standard*, DATABASE OF STATE INCENTIVES FOR RENEWABLES AND EFFICIENCY (May 23, 2011), http://www.dsireusa.org/incentives/incentive.cfm?Incentive_Code=MD05R&re=1&ee=1.

131. MD. CODE ANN., PUB. UTIL. § 7-703(b)(17) (LexisNexis 2010).

132. *See id.* § 7-704(b) (allowing for RECs); *see also id.* § 7-701(i) (defining RECs). The Maryland RPS requires unbundled RECs. HOLT & WISER, *supra* note 76, at 5 table 1. For a description of RECs, see *supra* Part I.B.1.

133. The PJM Interconnection is a regional transmission organization that coordinates the movement of wholesale electricity in all or parts of thirteen Mid-Atlantic states and the District of Columbia. *About PJM: Who We Are*, PJM.COM, http://pjm.com/about-pjm/who-we-are.aspx (last updated Jan. 3, 2012).

134. PUB. UTIL. § 7-701(i)(1)–(2).

135. *Id.* § 7-703(b)(17).

136. *Id.* § 7-701(l)(1) (defining solar energy as a Tier 1 renewable source); *id.* § 7-704(a)(2)(i)(1) (providing that beginning in 2012, solar energy is "eligible for inclusion in meeting the renewable energy portfolio standard only if the source is connected with

tuted a solar REC provision, requiring that an owner of a solar generating system who chooses to sell RECs "must first offer the credits for sale to an electricity supplier or electric company that shall apply them toward compliance with the renewable energy portfolio standard."[137]

II. ANALYSIS

The lawsuits in Massachusetts and Colorado have prompted commentators to question the soundness of other RPSs.[138] These suits could therefore impact not only the challenged state law but also the remaining states with renewable energy laws and those considering one.[139] The challenges were brought by entities with deep pockets[140] and a strong commitment to challenging similar laws.[141] With a lot of money at stake and future challenges to be expected, it would be prudent for Maryland to take another look at its law.

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the electric distribution grid serving Maryland."). Prior to 2012, the requirement was stricter:

> On or before December 31, 2011, [solar energy] that is not connected with the electric distribution grid serving Maryland is eligible for inclusion in meeting the renewable energy portfolio standard only if offers for solar credits from Maryland grid sources are not made to the electricity supplier that would satisfy requirements under the standard and only to the extent that such offers are not made.

Id. § 7-704(a)(2)(i)(2).

137. *Id.* § 7-704(a)(2)(ii).

138. *See, e.g.*, Jacobi, *supra* note 75, at 1118–33 (pointing out vulnerabilities of RPSs in several states, including Nevada, Texas, New York, New Mexico, and others); Bev Pearman, *Non-Profit Groups Challenge Colorado's RES and Question Public Policy Favoring Wind Energy*, RENEWABLE + LAW BLOG (Apr. 5, 2011), http://www.lawofrenewableenergy.com/tags/colorado-rps/ (posted by William H. Holmes) ("If plaintiffs are successful with their claims, then the states with RESs and [Renewable Portfolio Goal]s may have to modify their standards so they are not discriminating against out-of-state renewable energy generators.").

139. Indiana, for example, is considering an RPS. Press Release, Am. Wind Energy Ass'n, Gov. Mitch Daniels Signs Energy Bill With Voluntary Clean Energy Portfolio Standard for Indiana (May 11, 2011), *available at* http://www.renewableenergyworld.com/rea/partner/american-wind-energy-association/news/article/2011/05/gov-mitch-daniels-signs-energy-bill-with-voluntary-clean-energy-portfolio-standard-for-indiana.

140. TransCanada, the challenger of the Massachusetts RPS, is the largest independent power producer in the Canadian province of Ontario. Press Release, TransCanada, TransCanada Enters into Solar Generation (Dec. 20, 2011), *available at* http://www.transcanada.com/5911.html. It operates the largest wind farm in Canada and New England. *Id.* Its third-quarter earnings in 2011 were $417 million. Quarterly Report to Shareholders, TransCanada, TransCanada Reports an Increase in Third Quarter Comparable Earnings to $417 Million or $0.59 Per Share (Nov. 1, 2011), *available at* http://www.transcanada.com/docs/Investor_Centre/TCC_-_Q3_11_-_11_01_11.pdf.

141. *See Possible Outcomes*, *supra* note 17.

The suits in Massachusetts and Colorado provide two different frameworks for analyzing Maryland's RPS. Under a narrow challenge, exemplified by *TransCanada Power Marketing Ltd. v. Bowles*,[142] a court would examine specific provisions of the Maryland law.[143] In crafting the RPS, the Maryland legislature included incentives for renewable energy produced within a certain region,[144] causing provisions of the law to discriminate on their face.[145] Although promoting renewable energy provides legitimate health and environmental benefits, courts are likely to find that Maryland could achieve these benefits through less discriminatory means, thus concluding that portions of Maryland's RPS are unconstitutional.[146]

In contrast, *American Tradition Institute v. Colorado*[147] represents a much broader challenge.[148] Under this framework, which challenges the entire RPS, a court is unlikely to strike down the whole law as unconstitutional.[149] Nevertheless, state renewable energy laws like Maryland's are too vital a policy tool to risk having even portions of them overturned by a court. The state should therefore consider taking steps to preempt possible attacks. While overhauling the entire RPS is not necessary, Maryland can follow Massachusetts's lead and amend the most controversial provisions without significantly affecting the purpose of the law.[150]

A. Commerce Clause as Applied to Maryland's RPS

If a company brought a challenge similar to *TransCanada Power Marketing Ltd.*, a court is likely to find certain provisions of Maryland's RPS unconstitutional.[151] If an entity brought a broader challenge—along the lines of *American Tradition Institute*—to Maryland's RPS, a court is unlikely to find the entire law unconstitutional.[152]

142. Complaint, No. 4:10-cv-40070 (D. Mass. Apr. 16, 2010).

143. *See infra* Part II.A.1.

144. *See supra* Part I.B.2.c.

145. *See infra* Part II.A.1.a.

146. *See infra* Part II.A.1.b.

147. Amended Complaint for Injunctive and Declaratory Relief, No. 1:11-cv-00859-WJM-KLM (D. Colo. Apr. 22, 2011).

148. *See supra* Part I.B.2.b.

149. *See infra* Part II.A.2.

150. *See infra* Part II.B.

151. *See infra* Part II.A.1.

152. *See infra* Part II.A.2.

1. *A Specific Challenge to Maryland's RPS Would Reveal Three Facially Discriminatory Provisions in Maryland's Law*

A narrow challenge, as exemplified by *TransCanada Marketing Ltd.*, would target the provisions of Maryland's law that impose the greatest burden on interstate commerce. The portions of Maryland's law that risk being challenged as unconstitutional are (1) the requirement that RPS-eligible facilities must be located within the PJM interconnection (hereinafter "the interconnection requirement"); (2) the solar REC requirement; and (3) the solar carve-out.[153] When analyzing these provisions, a court would first determine whether the provisions discriminate on their face, triggering per-se invalidity, or whether they merely have a discriminatory effect, in which case a court would employ a balancing test.[154] A court is likely to find that the provisions are facially discriminatory because they discriminate against renewable energy producers based on location.[155]

a. *Three of Maryland's RPS Provisions Discriminate on Their Face*

A court is likely to find that all three of Maryland's vulnerable provisions are facially discriminatory. First, consider the interconnection requirement, which requires that all RPS-eligible facilities must be "located" either (a) "in the PJM region;" or (b) if they are located outside the PJM region they must be "in a control area that is adjacent to the PJM region, if the electricity is delivered into the PJM region."[156] By prefacing the interconnection provision with the word "located," Maryland invites a Commerce Clause challenge.[157]

The PJM region is comprised of all or parts of thirteen states and Washington, D.C.[158] By limiting eligibility to renewable energy produced within the PJM region, the first interconnection provision discriminates against all of thirty-seven states and parts of additional states. The second clause of Maryland's RPS reduces the number of

153. All three of these requirements are described in detail above. *See supra* Part I.B.2.c.

154. *See supra* Part I.A.

155. *See, e.g.*, Philadelphia v. New Jersey, 437 U.S. 617, 626–27 (1978) ("[W]hatever New Jersey's ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently."); *see also supra* Part I.A.1 (discussing how laws that discriminate against products based on their origins are facially discriminatory).

156. MD. CODE ANN., PUB. UTIL. §§ 7-701(i)(1), (2) (LexisNexis 2010).

157. Jacobi, *supra* note 75, at 1132–33.

158. *About PJM: Who We Are*, PJM.COM, http://www.pjm.com/about-pjm.aspx (last updated Jan. 3, 2012).

states Maryland discriminates against but does not solve the problem.[159] At best, part (b) includes generators located in most of the states east of Ohio but still "exclude[s] well over half of the United States based purely on location."[160] A court is likely to find that the interconnection requirement is facially discriminatory because statutes that discriminate against some states rather than all states still violate the Commerce Clause.[161]

Like the interconnection requirement, Maryland's solar REC provision also facially discriminates against more than half of U.S. states. Maryland requires that if an owner of a solar generating system chooses to sell RECs, "the owner must first offer the credits for sale to an electricity supplier or electric company that shall apply them toward compliance with the [RPS]."[162] This requirement favors suppliers based on location because the statute mandates that RPS-eligible facilities be located within or adjacent to Maryland's electricity grid.[163] When the Supreme Court declared unconstitutional a New Hampshire law prohibiting hydroelectric plants from selling power out-of-state before offering it in-state, the Court reasoned that "a State is without power to prevent privately owned articles of trade from being shipped and sold in interstate commerce on the ground that they are required to satisfy local demands."[164] Under the same reasoning, a court would find that Maryland's solar REC provision improperly prevents electricity from being sold freely in interstate commerce in an effort to satisfy the local demands for renewable energy created by the RPS. The solar REC provision is facially discriminatory because the provision discriminates against half of the United States and prevents a product from freely entering interstate commerce.

Finally, Maryland's solar carve-out is also facially discriminatory. The carve-out requires RPS-eligible solar energy to be produced within the electric distribution grid serving Maryland beginning in 2012.[165] This provision is even more discriminatory than the interconnection and solar REC provisions because it blocks solar energy produced in all of thirty-seven states.

159. Jacobi, *supra* note 75, at 1132.

160. *Id.* at 1133. *See Electric Market National Overview*, FED. ENERGY REGULATORY COMM'N, http://www.ferc.gov/market-oversight/mkt-electric/overview/elec-ovr-rto-map.pdf (last visited Jan. 16, 2012) (mapping United States electric grids).

161. *See supra* text accompanying note 43.

162. MD. CODE ANN., PUB. UTIL. § 7-704(a)(2)(ii) (LexisNexis 2010).

163. *Id.* §§ 7-701(i)(1)–(2).

164. New England Power v. New Hampshire, 455 U.S. 331, 338 (1982) (quoting Philadelphia v. New Jersey, 437 U.S. 617, 627 (1978)) (internal quotation marks omitted).

165. MD. CODE ANN., PUB. UTIL. §§ 7-704(a)(2)(i)(1)–(2) (LexisNexis 2010).

b. Under a Specific Challenge, a Court Could Find That Maryland's RPS Fails Strict Scrutiny

After determining that three provisions of Maryland's law are facially discriminatory, a court would next apply strict scrutiny to determine whether the provisions are constitutional.[166] To withstand the first prong of a court's scrutiny, Maryland must demonstrate that its law advances a legitimate purpose.[167] A court is likely to find that Maryland's goal of reducing emissions and promoting a healthy environment is legitimate.[168] By contrast, a court should not find Maryland's energy-security goal legitimate.[169] Under the second prong, a court would consider whether Maryland could achieve its legitimate purpose through less discriminatory means.[170] Because Maryland could have pursued three less discriminatory alternatives that would have still allowed it to meet at least some of its goals, a court could find that certain provisions of Maryland's law fail strict scrutiny.[171]

i. Maryland's RPS Advances a Legitimate Purpose

Applying strict scrutiny, a court would begin by asking whether Maryland's RPS advances a legitimate purpose.[172] This prong consists of two parts: (1) the purpose must be legitimate; and (2) the law must actually advance that purpose. According to the legislature, the purpose of the RPS was to procure "the benefits of electricity from renewable energy resources, including long-term decreased emissions, a healthier environment, increased energy security, and decreased reliance on and vulnerability from imported energy sources."[173]

166. *See, e.g.*, Hughes v. Oklahoma, 441 U.S. 322, 337 (1979) ("[F]acial discrimination invokes the strictest scrutiny of any purported legitimate local purpose . . . .").

167. *See, e.g.*, Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of Or., 511 U.S. 93, 100–01 (1994) ("[T]he [law] must be invalidated unless . . . it advances a legitimate local purpose . . . ." (quoting New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 278 (1988) (internal quotation marks omitted)). *See supra* note 54 for a description of how the standard courts apply to facially discriminatory laws differs from the traditional strict scrutiny standard.

168. *See infra* Part II.A.1.b.i.

169. *See infra* Part II.A.1.b.i.

170. *See, e.g.*, *Hughes*, 441 U.S. at 337 ("[F]acial discrimination invokes the strictest scrutiny of . . . the absence of nondiscriminatory alternatives.").

171. *See infra* Part II.A.1.b.ii.

172. *See, e.g.*, *Hughes*, 441 U.S. at 337 ("[F]acial discrimination invokes the strictest scrutiny of any purported legitimate local purpose . . . .").

173. MD. CODE ANN., PUB. UTIL. § 7-702(b)(1) (LexisNexis 2010).

Maryland's first and second goals—decreased emissions and a healthier environment—are environmental and public health goals[174] that a court would consider against the backdrop of recent Supreme Court cases. The Court has recognized that the preservation of the environment and public health are legitimate goals. In *New Energy Co. of Indiana v. Limbach*, for example, the state argued that its law discriminating against interstate commerce was justified because it encouraged the use of ethanol in gasoline in place of lead, thereby reducing harmful exhaust emissions.[175] Although the Court ultimately invalidated the law, it conceded that "[c]ertainly the protection of health is a legitimate state goal."[176] As in *Limbach*, Maryland may also claim that its goal of reducing harmful emissions is legitimate. Renewable energy produces no emissions, while traditional energy sources produce harmful air and water emissions. Thus, a court can be expected to find that Maryland's environmental and health goals are legitimate.[177]

A court would also likely find that Maryland's RPS will in fact advance these legitimate environmental and health goals. Like in Massachusetts and Colorado, the Maryland RPS relies on tradable RECs.[178] Most REC schemes allow "retailers to purchase RECs from renewable energy generators and submit them annually to state regulators."[179] Under a traditional REC scheme, therefore, a state cannot guarantee that the local benefits of renewable energy—decreased emissions, a healthier environment—will accrue in-state.[180] The regional requirements, however, ensure that renewable energy is produced in-state or within the region.[181]

174. The environmental goals of "long-term decreased emissions [and] a healthier environment" directly contribute to improvements in public health. *See* North Carolina *ex rel.* Cooper v. Tenn. Valley Auth., 593 F. Supp. 2d 812, 821–23 (W.D.N.C. 2009) (finding that emissions from electric power plants are "certain to cause premature mortality in humans," as well as other negative health impacts), *rev'd on other grounds*, 615 F.3d 291 (4th Cir. 2010). This Comment will refer to these goals interchangeably as "environmental goals" and "environmental and health goals."

175. 486 U.S. 269, 279 (1988).

176. *Id.* at 279–80.

177. *See id.* at 279 ("Certainly the protection of health is a legitimate state goal, and we assume for purposes of this argument that use of ethanol generally furthers it.").

178. *See* HOLT & WISER, *supra* note 76, at 5 table 1 (demonstrating that the RPSs of Massachusetts, Colorado, and Maryland all require RECs).

179. Jacobi, *supra* note 75, at 1111; *see also supra* Part I.B.1.

180. *See* Jacobi, *supra* note 75, at 1095–96 (discussing the difficulty of proving the in-state accrual of benefits without limiting the location of eligible renewable energy).

181. *See id.* at 1096 ("The obvious method to guarantee that benefits accrue in-state is to limit the location of renewable generators eligible to participate in the RPS-created market either to the state or immediate regional area.").

Locally generated renewable energy will offset the need for traditional energy facilities in Maryland[182] and the entire PJM region. Air and water do not recognize state boundaries; an improvement in air and water quality outside Maryland could improve Maryland's environment, especially if those improvements take place near Maryland.[183] Thus, the very language that makes Maryland's RPS facially discriminatory also enables the RPS to achieve the legislature's stated environmental and health goals.

Maryland also takes the threat of climate change very seriously[184] and its goal of reducing emissions would surely include minimizing the state's contribution to climate change. Climate change is a global phenomenon,[185] thus any decrease in emissions within Maryland and the surrounding region would decrease overall emissions that result in climate change.[186] A court could therefore determine that Maryland's RPS helps reduce climate change.

A court is unlikely to find that Maryland's third and fourth goals—energy security and decreased reliance on imported energy sources—are legitimate. These goals are very similar in effect and would be analyzed together. Here, the legislature's exact intent is unclear; the goals could be interpreted to apply to the state of Maryland or to the country as a whole. Maryland relies on coal to generate more than 50 percent of its electricity, but "most of the State's coal-

182. Maryland has six coal-fired power plants with a capacity of 400 megawatts and above. U.S. ENERGY INFO. ADMIN., DEP'T OF ENERGY, STATE ELECTRICITY PROFILES 2010, at 121 (Jan. 2012), *available at* http://www.eia.gov/cneaf/electricity/st_profiles/sep2009.pdf.

183. According to Neil Donahue, a chemistry professor at Carnegie Mellon University, "smoke from a Pittsburgh-area smokestack can surf the wind eastward then bend south along the East Coast, [passing through Maryland and] eventually turning west toward Baton Rouge where it swings northward through the Midwest before prevailing winds can carry it back through Pennsylvania." David Templeton & Don Hopey, *Wind and Terrain Play a Role in 'Transport' Pollution*, PITTSBURGH POST-GAZETTE, Dec. 15, 2010, *available at* http://www.post-gazette.com/pg/10349/1109207-114.stm. Because of these wind patterns, Maryland receives pollution from as far away as Pennsylvania and other eastern states. Transport pollution is such a strong concern that EPA recently announced a rule limiting the interstate transport of emissions of nitrogen oxides and sulfur dioxide. Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals, 76 Fed. Reg. 48,208 (proposed Aug. 8, 2011) (to be codified at 40 C.F.R. pts. 51, 52, 72, 78, 97).

184. Through its CO_2 Budget Trading Program, Maryland is a member of the Regional Greenhouse Gas Initiative, a regional carbon trading scheme. MD. CODE REGS. 26.09 (2011). The legislature passed the Greenhouse Gas Emissions Reduction Act in 2009. MD CODE ANN., ENVIR. § 2-1200 (LexisNexis 2007 & Supp. 2011).

185. *See* SOLOMON, *supra* note 9, at 2 (discussing the global nature of climate change).

186. As is true throughout this section, whether Maryland could have achieved these goals through other, less discriminatory, means will be discussed below. *See supra* Part II.A.1.b.

fired power plants burn coal shipped from West Virginia and Pennsylvania."[187] If the Maryland legislature's purpose was to reduce Maryland's reliance on West Virginia and Pennsylvania coal, it would seem to be exactly the type of isolationist behavior the dormant Commerce Clause was designed to prevent.[188] Under the alternative interpretation—wherein the legislature meant to decrease reliance on foreign sources of energy and increase the energy security of the United States—a court is also likely to find the goal invalid. To satisfy the dormant *Foreign* Commerce Clause,[189] a state must meet additional requirements beyond what is necessary to satisfy the dormant Interstate Commerce Clause.[190] Because the energy-security goal is invalid under the dormant Interstate Commerce Clause, it cannot be valid under the stricter dormant Foreign Commerce Clause test.

ii. Maryland Has Less Discriminatory Alternatives

A court must next consider the second prong of the strict scrutiny test: whether Maryland can meet its legitimate goals through less discriminatory means.[191] If Maryland is able to meet its legitimate environmental and health goals by pursuing an alternative that is less discriminatory, the state will not satisfy the lack-of-alternatives exception. A court is likely to find that Maryland has three less discriminatory means to achieve its goals. The state could (1) implement a system based on electricity bundled with the attributes of renewable energy instead of relying on RECs; (2) emphasize the delivery of benefits over the physical location of generators; and (3) strike the interconnection requirement entirely. Because Maryland has alternative

187. U.S. ENERGY INFO. ADMIN., DEP'T OF ENERGY, MARYLAND ENERGY FACT SHEET, http://www.eia.gov/state/state-energy-profiles.cfm?sid=MD (last updated Nov. 2009).

188. *See, e.g.*, New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 273–74 (1988) (the dormant Commerce Clause prohibits "regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors").

189. The dormant Foreign Commerce Clause is the analogue of the dormant Interstate Commerce Clause (commonly referred to, and referred to in this Comment, as the dormant Commerce Clause). *See supra* note 35.

190. In addition to satisfying the requirements of the dormant Interstate Commerce Clause, a state measure that impacts foreign commerce may not increase the risk of multiple taxation or impair the nation's ability to "speak with one voice" in foreign affairs. Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 446–49 (1979) (internal quotation marks omitted) (citing Michelin Tire Corp. v. Wages, 423 U.S. 276, 285 (1976)).

191. The only decision in which the Court concluded that the lack-of-alternatives prong was satisfied was *Maine v. Taylor*, 477 U.S. 131 (1986). There, the Court focused on "whether scientifically accepted techniques exist for the sampling and inspection of live baitfish." *Id.* at 146. Because no techniques had been developed, Maine had no alternatives to ensure that imported baitfish were not infected with parasites or nonnative species. *Id.* at 147, 151.

means to achieve its goals, a court could find that provisions of Maryland's RPS fail strict scrutiny.

States have two options when shaping the RPS obligation: (1) a bundled system or (2) a REC-based system.[192] Maryland chose the REC-based option and wrote additional regional requirements into the law.[193] Instead of relying on RECs, Maryland could have implemented a system based on electricity bundled with the attributes of renewable energy.[194] By definition, only generators in the region (or close enough to deliver energy into the region) can offer bundled electricity.[195] Bundled energy and attributes therefore assure "that environmental benefits will accrue to the state or region in which the RPS is established."[196]

In an influential industry treatise, scholars Nancy Rader and Scott Hempling argue that courts will not apply strict scrutiny to an RPS that bases eligibility on a generator's ability to produce benefits for a state (instead of basing it on the origin of the electricity).[197] They argue that "[a]lthough such a policy clearly will exclude distant generators, the exclusion will occur not because those generators are located in another state, but because their physical circumstances preclude benefits to the state. This feature avoids the facial discrimination attack which makes explicit location requirements vulnerable."[198] Under a bundled system, generators are RPS-eligible not based on their location but because they provide benefits to the state. The system is therefore a less discriminatory alternative, and so Maryland is likely to fail the second prong of the strict scrutiny test.

In lieu of switching to a different system, Maryland has two alternatives under its current REC-based system. The first possible alternative under a REC-based system would be for Maryland to focus on delivery of benefits rather than physical location of the generator. The statute's current interconnection requirement defines a REC as elec-

192. *See* RADER & HEMPLING, *supra* note 73, at 55; *see also supra* Part I.B.1.

193. *See* HOLT & WISER, *supra* note 76, at 5 table 1 (demonstrating that the Maryland RPS requires RECs). The three constitutionally suspect provisions within Maryland's RPS—the interconnection requirement, solar REC requirement, and solar carve-out—all contain regional requirements that favor suppliers and generators based within the PJM region. This Comment refers to all three provisions collectively as "regional requirements."

194. *See supra* Part I.B.1.

195. HOLT & WISER, *supra* note 76, at 3.

196. *Id.*

197. *See* RADER & HEMPLING, *supra* note 73, at A-3 (arguing that this approach "avoids the facial discrimination attack which makes explicit location requirements vulnerable").

198. *Id.*

tricity derived from a renewable source that "is *located*: (1) in the PJM region or in a state that is adjacent to the PJM region; or (2) outside the area described in item (1) . . . but in a control area that is adjacent to the PJM region, if the electricity is delivered into the PJM region."[199] Since laws that discriminate against a product based solely on location are facially discriminatory,[200] it is unfortunate that the Maryland legislature prefaced the entire interconnection requirement with the discriminatory word "located."[201]

In part (2) of the interconnection requirement, however, the legislature introduced a delivery component. Emphasizing the delivery of benefits is far less discriminatory than focusing on the location of an energy producer because such focus merely makes the region surrounding the enacting state "a more attractive market for renewable energy generation in the same way as would a tax break offered to those who sell to or locate within the state."[202] By eliminating the "location" language and emphasizing the existing delivery component, Maryland's RPS would not contain the suspect location-based language while still meeting the goals of reducing regional emissions and promoting a healthy environment.

Amending the interconnection requirement would also lessen the burden placed on interstate commerce by the solar REC requirement and the solar carve-out. The solar REC requirement would not discriminate on its face since that provision is only constitutionally suspect because it is tied to the interconnection requirement.[203] The solar carve-out, however, contains location-specific language.[204] Nevertheless, like the interconnection requirement, the solar carve-out provision would cease to be facially discriminatory if the Maryland legislature changed the emphasis from the location of the solar ener-

199. MD. CODE ANN., PUB. UTIL. § 7-701(i)(1)–(2) (LexisNexis 2010) (emphasis added).

200. *See supra* Part I.A.1.

201. *See* Jacobi, *supra* note 75, at 1132–33 (arguing that Maryland's RPS focuses on in-region location to its detriment).

202. *See id.* at 1117 (quoting RADER & HEMPLING, *supra* note 73, at A-4) (internal quotation marks omitted) (describing the benefits of bundled regional limits disguised as eligibility based on in-state benefit delivery).

203. Maryland requires that if an owner of a solar generating system chooses to sell RECs, "the owner must first offer the credits for sale to an electricity supplier or electric company that shall apply them toward compliance with the [RPS]." PUB. UTIL. § 7-704(a)(2)(ii) (LexisNexis 2010). Because RPS-eligible facilities must be located within Maryland's electricity grid, requiring an owner of a solar generating system to first offer the credits to an eligible electricity supplier favors suppliers within the PJM grid.

204. It requires that RPS-eligible solar energy be produced within the electric distribution grid serving Maryland. *Id.* § 7-704(a)(2)(i)(1).

gy produced to the ability of the producer to deliver the solar energy to the region.[205]

The second possible REC-based alternative would involve striking the regional requirements entirely. By striking the regional requirements, Maryland would rid the RPS of the three facially discriminatory provisions and eliminate any danger that its law violates the dormant Commerce Clause. Striking these requirements, however, would only allow Maryland to meet its large-scale goal of reducing climate change[206] and would preclude the state from receiving any localized benefits of renewable energy.[207] Although air and water do not respect geographic boundaries, Maryland is more likely to enjoy a cleaner environment if renewable energy replaces traditional energy within the surrounding region.[208] Thus, while a challenger may argue that Maryland could achieve its legitimate goal of reducing climate change by eliminating the regional requirements, the state could strongly counter that it cannot achieve any localized environmental and health benefits without some form of regional restrictions. Eliminating the regional requirements entirely, therefore, is not a viable alternative.

2. A Broad Challenge to Maryland's RPS Is Unlikely to Succeed

A broader challenge to Maryland's RPS, as exemplified by *American Tradition Institute v. Colorado*, could have more sweeping effects than a narrow suit. A suit similar to that brought by ATI would challenge the entire law as facially discriminatory, argue that the purpose of the law renders it invalid, and introduce a charge that the law impermissibly regulates out-of-state business conduct.[209] When analyzing these broad allegations, it is necessary to discount the discriminatory provisions discussed in Part II.A.1 and consider the law as a whole. Once a court takes this approach, it should find that, at most, the law has an incidental effect on commerce, but not that it is facially

205. *See supra* text accompanying note 202.

206. Because climate change is a global phenomenon, a reduction anywhere will decrease the amount of greenhouse gas emissions overall. *See* Solomon, *supra* note 9, at 2 (discussing the global nature of climate change).

207. *See supra* text accompanying note 180.

208. A renewable energy source in a nearby state is likely to produce more benefits for Maryland because of its close proximity, as compared to a far-away source. *See* RADER & HEMPLING, *supra* note 73, at A-5 (noting that the benefits of renewables are not easily confined to a single state). *But see* New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 279 (1988) (noting that out-of-state ethanol provides no fewer health benefits than in-state ethanol).

209. *See infra* Part I.B.2.b (discussing ATI's challenge to the Colorado RPS).

discriminatory. Here, the more lenient *Pike v. Bruce Church Inc.* balancing test[210] would apply, and a court is likely to find that the benefits of the law outweigh any incidental burdens.[211] A court should not find that the law's purpose unconstitutionally discriminates against interstate commerce because the law achieves more than simple economic protectionism.[212] Finally, a court is unlikely to find that the Maryland law impermissibly regulates extraterritorial conduct since Maryland treats in-state companies the same as out-of-state companies.[213]

a. Maryland's RPS in Its Entirety Burdens Commerce Incidentally, if at All

A challenge similar to the Colorado lawsuit would first claim that Maryland's entire RPS is unconstitutional because it prohibits energy suppliers from putting a certain amount of electricity from fossil fuel sources into the grid.[214] In Maryland's case, the claim would be that by 2022, utilities supplying electricity to the interstate grid would be burdened because 20 percent of their energy could not come from fossil fuels.[215] In essence, the law manipulates the market for clean energy by requiring a certain percentage of renewable energy regardless of the price. Pursuant to the Supreme Court's Commerce Clause jurisprudence, a court would consider whether the law burdens interstate commerce and, if so, to what extent.[216] Although, as discussed, a court could find *provisions* of the law facially discriminatory,[217] it is unlikely that a court would find that the entire law discriminates on its face. Requiring a certain amount of renewable energy sets up no barriers to commerce based on the origin of the energy, does not manipulate the price of out-of-state versus in-state goods, and does not attempt to regulate out-of-state conduct.[218]

A court would next determine whether a law that encourages a certain type of good has an incidental effect on commerce. In *Exxon Corp. v. Governor of Maryland*, the Court upheld a law that favored one

210. 397 U.S. 137, 142 (1970).

211. *See infra* Part II.A.2.a.

212. *See infra* Part II.A.2.b.

213. *See infra* Part II.A.2.c.

214. Amended Complaint for Injunctive and Declaratory Relief at Part II.A, Am. Tradition Inst. v. Colorado, No. 1:11-cv-00859-WJM-KLM (D. Colo. Apr. 22, 2011).

215. MD. CODE ANN., PUB. UTIL. § 7-703(b)(17) (LexisNexis 2010).

216. *See supra* Part I.A (outlining the Court's Commerce Clause jurisprudence).

217. *See supra* Part II.A.1.

218. *See supra* Part I.A.1 (providing examples of facially discriminatory laws that fit into these categories).

type of interstate petroleum refiners over another by barring the disfavored type from owning retail stores in Maryland.[219] Because Maryland had no oil refiners, the law affected only out-of-state companies.[220] Regardless, the Court found no discrimination, explaining that "the Act create[d] no barriers whatsoever against interstate [petroleum] *dealers*."[221] Similarly, the RPS scheme encourages one type of energy over another, but it treats all energy *companies* the same. The RPS as a whole does not bar any out-of-state electric company from doing business in Maryland. Instead, it merely requires that companies who want to do business in Maryland derive 20 percent of their electricity from renewable sources by 2022.[222]

While a court could conclude that Maryland's RPS does not discriminate at all, it could also find that it incidentally burdens certain interstate companies. After all, to comply with Maryland's law, companies must purchase RECs, which tend to be more expensive than traditional energy.[223] Laws with merely incidental effects are properly analyzed under the *Pike* balancing test.[224]

Under *Pike*, local benefits, such as improving environmental health and safety, outweigh an incidental burden on commerce.[225] In *United Haulers Association, Inc. v. Oneida-Herkimer Solid Waste Management Authority*, for example, the Court examined a flow-control ordinance that required trash haulers to deliver solid waste to an in-state waste processing facility.[226] The Court applied the *Pike* balancing test

219. 437 U.S. 117, 119–21 (1978).

220. *Id.* at 125–26.

221. *Id.* at 126 (emphasis added). The Court continued:

> While the refiners will no longer enjoy their same status in the Maryland market, in-state independent dealers will have no competitive advantage over out-of-state dealers. The fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce.

Id.

222. MD. CODE ANN., PUB. UTIL. § 7-703(b)(17) (LexisNexis 2010).

223. *See* OFFICE OF ENERGY EFFICIENCY AND RENEWABLE ENERGY, U.S. DEP'T OF ENERGY, GUIDE TO PURCHASING GREEN POWER: RENEWABLE ELECTRICITY, RENEWABLE ENERGY CERTIFICATES, AND ON-SITE RENEWABLE GENERATION 7 (2010) (explaining that RECs tend to be more expensive than conventional energy sources).

224. *See supra* note 56.

225. *See, e.g.*, Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 472–74 (1981) (upholding a Minnesota statute banning the use of environmentally harmful plastic milk containers).

226. 550 U.S. 330, 334 (2007). The Court did not strike down the law as facially discriminatory, which it effectively was, because it fit into the market-participant exception to the Commerce Clause. *Id.* For a discussion of the market-participant exception, see *supra* note 38.

and concluded that the benefits of the ordinance—increased recycling, among other benefits—outweighed the burdens.[227] The effect on interstate commerce in that case was more substantial than here because the law at issue in *United Haulers* clearly favored in-state facilities. Maryland's RPS as a whole does not favor in-state facilities, and a court is likely to find that Maryland's legitimate environmental and health goals outweigh any burden on commerce created by the entire RPS.

b. The Purpose of Maryland's Law Is Constitutional

Maryland's RPS would also likely survive allegations that the purpose of the RPS facially discriminates against electricity generators operating outside of state borders.[228] Like Colorado[229] and other states,[230] Maryland included the economic benefits of renewable energy in its statement of purpose.[231] While the dormant Commerce Clause prohibits "simple economic protectionism,"[232] the analysis does not end there. In addition to the economic impacts of the RPS, the Maryland legislature also stressed the law's environmental and health benefits.[233] Although courts carefully scrutinize the stated purpose of a law,[234] they do not do so in a vacuum. If Maryland claimed to have enacted the RPS because of a concern for the environment without ever having taken an interest in the environment

227. 550 U.S. at 346–47. The Court emphasized that the ordinances allowed the counties to finance their waste disposal services while also increasing recycling and conferring significant health and environmental benefits. *Id.*

228. Amended Complaint for Injunctive and Declaratory Relief at Part II.B, Am. Tradition Inst. v. Colorado, No. 1:11-cv-00859-WJM-KLM (D. Colo. Apr. 22, 2011).

229. *See supra* note 124.

230. *See, e.g.*, 26 DEL. CODE ANN. tit. 26, § 351(b) (2009) ("The General Assembly finds and declares that the benefits of electricity from renewable energy resources . . . include . . . new economic development opportunities.").

231. *See* MD. CODE ANN., PUB. UTIL. § 7-702(a) (LexisNexis 2010) ("It is the intent of the General Assembly to . . . recognize the *economic*, environmental, fuel diversity, and security benefits of renewable energy resources . . . ." (emphasis added)).

232. *See supra* notes 35–37 and accompanying text.

233. *See supra* note 231.

234. *See, e.g.*, Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of Or., 511 U.S. 93, 107–08 (1994) (explaining that characterizing its surcharge on in-state disposal of out-of-state waste as "resource protectionism" did not validate the discriminatory statute); New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 279 (1988) (recognizing that the protection of health is a legitimate state goal but finding that health was "merely an occasional and accidental effect of achieving . . . [the law's] purpose, favorable tax treatment for . . . ethanol [produced in-state]"); Dean Milk Co. v. City of Madison, 340 U.S. 349, 354 (1951) (explaining that Madison cannot discriminate against interstate commerce "even in the exercise of its unquestioned power to protect the health and safety of its people, if reasonable nondiscriminatory alternatives . . . are available").

previously, a court would have good reason to suspect the claim. Maryland, however, has shown a strong commitment to environmental issues. It is part of the Regional Greenhouse Gas Initiative,[235] and it has taken great strides to clean up emissions from cars and traditional energy sources.[236] Thus, it is unlikely that a court would find Maryland's environmental goals illegitimate.

A court could even find that Maryland's economic goals are legitimate benefits. Since encouraging certain types of energy has, at most, incidental effects on interstate commerce, *Pike* is the appropriate test to apply. In *United Haulers*, the Court upheld a discriminatory ordinance under the *Pike* test because the benefits of the ordinance, which included financing a municipal service, outweighed any incidental burdens on interstate commerce.[237] While emphasizing that "revenue generation is not a local interest that can justify *discrimination* against interstate commerce," the Court explained that revenue generation could be considered a cognizable benefit for purposes of the *Pike* test.[238] Thus it is unlikely that a court would find the stated purposes of Maryland's law to be unconstitutional.

c. Maryland's RPS Does Not Attempt to Regulate Extraterritorial Conduct

Using ATI's suit as a guide, one may argue that Maryland's RPS violates the dormant Commerce Clause by impermissibly regulating out-of-state conduct.[239] These types of claims have often arisen in California,[240] which has unusual sway because of the size of its econo-

235. The Regional Greenhouse Gas Initiative is a cooperative effort among several Northeast and Mid-Atlantic states, including Maryland, at capping and reducing "CO_2 emissions from the power sector 10 percent by 2018." The Initiative's homepage can be found at http://rggi.org/.

236. *See* MD. CODE ANN., ENV. §§ 2-1001 *et seq.* (LexisNexis 2007 & Supp. 2011) (Healthy Air Act targeting emissions from traditional energy sources); MD. CODE REGS. 26.09 (2011) (Maryland CO_2 Budget Trading Program Rules); MD. CODE REGS. 26.11.34 (2011) (Clean Cars Program).

237. United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 346 (2007) ("We find it unnecessary to decide whether the ordinances impose any incidental burden on interstate commerce because any arguable burden does not exceed the public benefits of the ordinances.").

238. *Id.*

239. *Cf.* Amended Complaint for Injunctive and Declaratory Relief at ¶ 75, Am. Tradition Inst. v. Colorado, No. 1:11-cv-00859-WJM-KLM (D. Colo. Apr. 22, 2011).

240. *See, e.g.*, Rocky Mountain Farmers Union v. Goldstene, No. CV-F-09-2234 LJO DLB, 2011 WL 6934797, at *12–15 (E.D. Cal. Dec. 29, 2011).

my.[241] An Eastern District of California court recently struck down a state law that attempted to reduce greenhouse gas emissions from ethanol used to make gasoline.[242] California did not produce ethanol. Therefore, the law, which favored ethanol produced a certain way, had the effect of regulating out-of-state ethanol producers.[243] In contrast to the California ethanol law, Maryland's RPS affects energy generators with plants inside—as well as outside—Maryland's borders.[244] Maryland also has less of an impact on the conduct of other states than California due to the much smaller size of its economy. Therefore, it is unlikely that a court would find that Maryland's RPS impermissibly regulates out-of-state conduct.

A Colorado-type challenge to Maryland's RPS based on regulation of out-of-state conduct would also likely fail because of a difference between the two laws. The Colorado RPS authorizes the use of tradable RECs but mandates that definitions of "renewable energy" be identical to those set out in the Colorado law.[245] While Maryland's law, like Colorado's, relies on RECs, Maryland has no similar provision requiring that the definition of "renewable energy" be identical to those set out in the Maryland law.[246] Thus, regardless of whether ATI's claim against Colorado has merit, Maryland's law does not have the same provision and is not susceptible to the same challenge.

In sum, under a challenge similar to *American Tradition Institute*, a court would apply the more lenient *Pike* test and conclude that, on balance, the burden placed on commerce by Maryland's RPS is outweighed by the environmental and health benefits it provides. It should not find the statement of purpose, which includes an economic benefit, fatal to the RPS because the law is aimed at achieving legitimate environmental goals in addition to improving the economy. Finally, a court should not find that the RPS has the effect of regulat-

241. *See California's Economy Dips to No. 9 in World*, SACRAMENTO BEE (Jan. 13, 2012), http://www.sacbee.com/2012/01/13/4184193/californias-economy-dips-to-no.html (reporting that California is the ninth biggest economy in the world).

242. *Goldstene*, 2011 WL 6934797, at *16 (concluding that California's Low Carbon Fuel Standard impermissibly controlled conduct outside of its borders).

243. *Id.* at *13–15.

244. *See supra* Part I.A.2.c.

245. *See* COLO. REV. STAT. ANN. § 40-2-124(1)(d) ("The commission shall not restrict the qualifying retail utility's ownership of renewable energy credits if the qualifying retail utility . . . uses definitions of eligible energy resources that are limited to those identified in paragraph (a) [defining renewable energy] of this subsection.").

246. *Compare* COLO. REV. STAT. § 40-2-124(1)(a) (West 2004 & Supp. 2011) (outlining Colorado's REC requirement), *with* MD. CODE ANN., PUB. UTIL. § 7-701 (LexisNexis 2010) (no similar REC requirement).

ing out-of state companies because it has little impact on their conduct. Thus, Maryland would prevail under a broad challenge.

B. State Action to Amend Maryland's Statute

As challenges to state RPSs mount, it is prudent for Maryland to take another look at its law. Although the federal government could take action,[247] the Maryland legislature, which revisited the law as recently as 2010, is best suited to head off any potential challenges. The General Assembly should start with the three facially discriminatory provisions.

As discussed, Maryland has three alternatives to its current RPS. First, it could switch from a REC-based system to a system that relies on energy bundled with the attributes of renewable energy.[248] While

247. While a longer discussion of Congress's authority to ensure that renewable energy laws like Maryland's are found to be constitutional is outside the scope of this Comment, the federal government has two options. First it could pass a federal renewable energy standard, which would preempt state RPSs. Second, it could authorize discriminatory state RPSs.

Although Congress could pass a federal RPS, it is unlikely that any such bill would pass given the current political climate. *See, e.g.*, Transparency in Regulatory Analysis of Impacts on the Nation (TRAIN) Act of 2011, H.R. 2401, 112th Cong. (2011) (requiring the Environmental Protection Agency to conduct a cost-benefit analysis before implementing new regulations); Regulations from the Executive in Need of Scrutiny (REINS) Act of 2011, H.R. 10, 112th Cong. (2011) (requiring Congress to vote on all new major rules of the executive branch). If Congress did pass a federal RPS, it would probably be less stringent than most state RPSs. To pass, it would most likely act as a ceiling, requiring states with strong RPSs to lower their standards. Although the regulation could potentially act as a floor preemption, this option would also have flaws. States would enact stronger RPSs, and in doing so would continue their attempts to preserve the economic and environmental benefits for their own states. Thus, a floor preemption would likely do nothing to alleviate current Commerce Clause issues. *See* Jim Rossi, *The Shaky Political Economy Foundation of a National Renewable Electricity Requirement*, 2011 U. ILL. L. REV. 361, 371 ("[A]llowing a national RPS to preempt unconstitutional state protectionist measures may be one of the more significant benefits offered by a national RPS.").

In the alternative, Congress could pass a law approving of certain discriminatory RPSs, as it has done with insurance. *See* W. & S. Life Ins. Co. v. State Bd. of Equalization of California, 451 U.S. 648, 653 (1981) ("Congress removed all Commerce Clause limitations on the authority of the States to regulate and tax the business of insurance when it passed the McCarran-Ferguson Act . . . ."). While such a law would face political challenges similar to passing a federal RPS, the preemption issue would not be as problematic. New Hampshire has argued that Congress essentially approved of discriminatory RPSs when it established the Federal Energy Regulatory Commission. The Supreme Court dismissed this argument so quickly, however, that it is very unlikely this particular argument could be resurrected. *See* New England Power Co. v. New Hampshire, 455 U.S. 331, 340–41 (1982) ("Congress did no more than leave standing whatever valid state laws then existed [and] intended only that its legislation 'take no authority from state commissions.'" (alterations and emphasis omitted)).

248. *See supra* Part II.A.1.b.ii.

this approach would assure that benefits accrue locally,[249] it would compel Maryland to completely rewrite its law. In addition, a REC-based system has certain advantages over bundled renewable electricity. RECs are easily tracked for RPS compliance purposes[250] and allow more flexibility than bundled electricity and attributes. It is not surprising, therefore, that most states with RPSs favor a system involving tradable RECs.[251]

To keep its current REC-based system, Maryland legislators have two options. They can eliminate the regional requirement entirely or they can emphasize the delivery of benefits over the location of the electricity generation. Eliminating the regional requirements is less desirable because it will reduce Maryland's ability to guarantee that the environmental and health benefits accrue locally.[252] While improvements to air and water quality outside Maryland could improve the state's environment,[253] the current regional requirements incorporate energy produced in states as far away from Maryland as Ohio. The benefits to Maryland of renewable energy generated farther west than Ohio are too indirect to be relied upon. Thus, the second REC-based option is Maryland's best choice. Only by emphasizing delivery over location can Maryland's RPS survive a Commerce Clause challenge *and* ensure that benefits accrue in-state or in-region.[254]

By focusing on benefit-delivery and not location, Maryland's RPS will continue to impact interstate commerce to some extent. Without the facially discriminatory provisions, however, the law would be analyzed under the *Pike* balancing test—the same test a court would apply if faced with a broad challenge to Maryland's RPS.[255] Under this more lenient test, Maryland would very likely prevail. The environmental and health benefits the RPS provides for Maryland would outweigh any impact on interstate commerce.

Although a broad challenge is unlikely to succeed, the state can take a simple step to reduce the chance of a broad attack, by revising

249. *See supra* text accompanying note 196.

250. *See supra* Part I.B.1 (discussing the difficulties of tracking bundled electricity in power pool arrangements; *see also* HOLT & WISER, *supra* note 76, at 3 (discussing the benefits of RECs).

251. *See* HOLT & WISER, *supra* note 76, at 4 (explaining that most states allow RECs for RPS compliance purposes).

252. *See supra* Part II.A.1.b.ii.

253. *See supra* note 183.

254. The revised provision could define an REC as "1 megawatt-hour of electricity that is derived from a renewable source that delivers electricity into the PJM region."

255. *See supra* Part II.A.2 (discussing how a court, using the *Pike* standard, would dismiss a broad challenge to Maryland's RPS).

its statement of purpose. While the statement should not dictate the outcome of a challenge, the Colorado suit demonstrates that when a state legislature takes economic considerations into account, the law becomes an easier target. While stressing the economic benefits of renewable energy might have helped legislators pass the RPS initially,[256] now that Maryland's law is on the books, the state will receive the economic benefits regardless of the stated purpose. Revising the purpose is an easy step the legislature can take to reduce the risk of a challenge.

III. CONCLUSION

Renewable energy is a multi-billion-dollar industry. With so much at stake, challenges like those in Massachusetts and Colorado are not surprising and can be expected in the future. Maryland is among the twenty-nine states with RPS legislation, all of which are vulnerable to a certain extent.[257] A court could find that certain provisions of Maryland's RPS law are unconstitutional because the law favors renewable energy generated within a defined region.[258] Although courts could overlook the constitutional defects of the RPS by focusing on the benefits of renewable energy, they are more likely to find that Maryland could continue to receive the benefits of renewable energy through less discriminatory means.[259] State renewable energy laws like Maryland's are too vital to risk having any provisions of them overturned by a court. Given the recent challenges to state RPSs, Maryland should consider taking steps today to preempt possible attacks. While abandoning the entire RPS is far from necessary, the state should keep its REC-based system but emphasize the delivery of benefits over the location of the energy source. Finally, Maryland should revisit its statement of purpose.[260]

256. Press Release, Office of Governor Martin O'Malley, Governor Martin O'Malley Releases Clean Energy Agenda to Promote Jobs, Sustainability (Jan. 15, 2010) (stressing the economic and job-growth benefits of the Maryland RPS).

257. *See supra* note 3 (listing the twenty-nine states with RPSs).

258. *See supra* Part II.A.1 (arguing that provisions of Maryland's RPS are unconstitutional); *see also supra* Part II.A.2 (arguing that the broad RPS system is constitutional).

259. *See* discussion *supra* Part II.A.1.b.ii.

260. *See* discussion *supra* Part II.B.